



Class Ruling

Income tax: Unilife Group restructure – employee share scheme – treatment of unlisted options

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83A-130 of the ITAA 1997; and
- section 130-80 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all persons who, prior to the restructure described in paragraphs 14 to 20 of this Ruling, were Australian resident employees of Unilife Medical Solution Limited (Unilife) or any of its wholly owned subsidiaries (Unilife group) who:

- were issued with options under the employee share option plan referred to in paragraph 11 of this Ruling, prior to 30 June 2009;
- did not make an election under former section 139E of the *Income Tax Assessment Act 1936* (ITAA 1936) in relation to the options;
- held the options at the time of the restructure; and
- had not had a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 happen to the options prior to the restructure.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 20 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the income year ending 30 June 2010. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant:

- the original application for a class ruling received 27 October 2009;
- the revised application provided 23 December 2009; and
- responses to subsequent requests for information.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. Prior to the restructure described in paragraphs 14 to 20 of this Ruling, Unilife was a listed company on the Australian Securities Exchange and was the head company of the Unilife group.

11. Unilife operated an employee share option plan (the plan) under which options to acquire Unilife shares (Unilife options) were issued to participants. The Unilife options were issued to participants for no consideration.

12. The Unilife options could be exercised during an exercise period with the payment of an exercise price, provided the vesting conditions specified in the offer document were satisfied.

13. The applicant has advised that the Unilife options were qualifying rights for the purposes of the former Division 13A of Part III of the ITAA 1936.

The restructure

14. In January 2010, Unilife group undertook a corporate restructure that resulted in the establishment of a new parent company. The new parent company is incorporated in the United States of America and is referred to in this Ruling as Unilife US.

15. The restructure was implemented through two separate court sanctioned schemes of arrangement under the *Corporations Act 2001*, one involving shareholders and the other involving holders of Unilife options issued under the plan.

16. The applicant has advised that a key objective of the restructure was to place all current shareholders and optionholders in substantially the same financial position immediately after the restructure as they were immediately prior to the restructure.

Shareholder scheme of arrangement

17. Under the shareholder scheme of arrangement all the existing ordinary shares in Unilife were transferred to Unilife US. In consideration for shareholders transferring their shares, shareholders received one CHES Depositary Interest (equivalent to one sixth of an underlying share of common stock in Unilife US) for every share held. Shareholders also had the option to elect to receive common stock in Unilife US, in which case they would receive one share of common stock in Unilife US for every six shares held in Unilife.

Optionholder scheme of arrangement

18. Under the optionholder scheme of arrangement, all existing options in Unilife were cancelled. All optionholders in Unilife were issued with a new option (replacement option) to acquire a share of common stock in Unilife US for every six Unilife options.

19. Each replacement option issued to the participant:

- has an exercise price equal to six times the exercise price of each Unilife option it replaced;
- has an exercise period equal to the unexpired exercise period of the Unilife options it replaced;
- has a vesting schedule identical to that of the Unilife options it replaced; and
- is subject to equivalent performance hurdles (if any) as applied to the replaced Unilife options.

20. The applicant has advised that immediately after the restructure:

- the employment of employees remained unchanged and participants remained employees of either Unilife US, Unilife or a subsidiary of Unilife;
- no participant held a beneficial interest in more than 5% of the shares in Unilife US; and
- no participant was in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of Unilife US.

Ruling

21. A Unilife option held by a participant prior to the restructure is an ESS interest for the purposes of Division 83A.

22. Where under the restructure a participant's Unilife options are replaced with Unilife US options, the replacement options will be treated for the purposes of section 83A-130 as a continuation of the ESS interests they replaced.

23. Any capital gain or capital loss that arises under the restructure as a result of the replacement of the old ESS interest with a new ESS interest will be disregarded, under subsection 130-80(1).

Commissioner of Taxation

21 July 2010

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

ESS interest and ESS deferred taxing point

24. Division 83A of the ITAA 1997 applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009. Division 83A of the ITAA 1997 also applies to certain shares, rights and stapled securities acquired before 1 July 2009 under Division 83A of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP) Act 1997).

25. By reason of subsection 83A-5(2) of the IT(TP) Act 1997, Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A of the ITAA 1997 to the extent that it relates to that Subdivision) applied in relation to a Unilife option held by a participant under the plan because:

- it was an ESS interest within the meaning of subsection 83A-10(1) of the ITAA 1997 (being a right to acquire a beneficial interest in a share in a company);
- former subsection 139B(3) of the ITAA 1936 applied in relation to the ESS interest (that is, the Unilife option was a qualifying right within the meaning of former section 139CD of the ITAA 1936 and a participant had not made an election covering the Unilife option under former section 139E of the ITAA 1936);
- the Unilife option was acquired (within the meaning of former Division 13A of Part III of the ITAA 1936) before 1 July 2009; and
- the cessation time mentioned in former subsection 139B(3) and former section 139CB of the ITAA 1936 did not occur before 1 July 2009.

26. Under subsection 83A-110(1), an amount will be included in the assessable income of a participant in respect of their ESS interest in the income year in which the ESS deferred taxing point occurs. The amount assessed will be the market value of the interest at the ESS deferred taxing point reduced by the cost base of the interest.

27. The ESS deferred taxing point for a right is usually worked out under section 83A-120 of the ITAA 1997. However, because Subdivision 83A-C of the ITAA 1997 applies to the Unilife option held by a participant in the plan by virtue of subsection 83A-5(2) of the IT(TP) Act 1997, subsection 83A-5(4) of the IT(TP) Act 1997 also applies. A participant will treat the ESS deferred taxing point for the Unilife option as being the cessation time worked out under former section 139CB of the ITAA 1936, subject to subsection 83A-120(3) of the ITAA 1997.

28. The replacement option in Unilife US under the restructure will also be an ESS interest within the meaning of subsection 83A-10(1) as it is a right to acquire a beneficial interest in a share of common stock in Unilife US under an employee share scheme.

The restructure

29. In situations where employees have deferred their income tax liability arising from a discount on shares or rights acquired under an employee share scheme, a corporate restructure may give rise to an ESS deferred taxing point triggered by a disposal of their shares or rights or by breaking the employment relationship between the employee and the company that originally granted the shares or rights.

30. The object of section 83A-130 is to ensure that employees are not adversely affected by takeovers and restructures, by allowing taxpayers who have deferred tax under an employee share scheme to roll-over an ESS deferred taxing point that would otherwise occur due to a corporate restructure. When certain conditions are satisfied the replacement ESS interests will be treated as a continuation of the old interests.

31. Under subsection 83A-130(1), the employee share scheme rules in Division 83A will continue to apply if:

- (a) ESS interests in a company (the old company) acquired under employee share schemes can reasonably be regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies as a result of a change (the restructure) in the ownership (including the structure of the ownership) of the old company; and
- (b) just before the restructure, you held ESS interests (the old interests) in the old company that you acquired under an employee share scheme.

32. The condition in paragraph 83A-130(1)(a) was satisfied as the Unilife corporate restructure resulted in Unilife becoming the subsidiary of Unilife US. As explained in paragraph 25 of this Ruling, the Unilife options, acquired under the plan and held by participants just before the restructure, were ESS interests within the meaning of subsection 83A-10(1). The restructure resulted in those ESS interests in Unilife (the old company) being replaced by ESS interests in Unilife US (the new company).

33. The condition in paragraph 83A-130(1)(b) was also satisfied as just before the restructure, participants held ESS interests (options) in Unilife that were acquired under an employee share scheme.

Conditions for treating new interests as continuation of old interests

34. Subsection 83A-130 sets out a number of conditions that must be met before the new ESS interests can be treated as a continuation of the old interests.

35. Subsection 83A-130(2) provides that for the purposes of Division 83A, any new ESS interests in a new company acquired in connection with a restructure can be treated as a continuation of the old ESS interests to the extent that:

- (a) as a result of the restructure, a participant stops holding the old ESS interests; and
- (b) the new ESS interests can reasonably be regarded as matching any of the old ESS interests.

36. The cancellation, under the optionholder scheme of arrangement, of the Unilife options held by participants will satisfy the condition in paragraph 83A-130(2)(a).

37. The note to paragraph 83A-130(2)(b) provides that one of the factors to consider, in determining to what extent the new ESS interests can reasonably be regarded as matching any of the old ESS interests, is the respective market values of both interests.

38. In determining whether the new ESS interests can reasonably be regarded as matching any of the old ESS interests, the attributes of the ESS interests immediately before the restructure need to be the same, or substantially the same, immediately after the restructure.

39. There is no need for a one-to-one ratio between the old ESS interests and the new ESS interests in order for them to be matching, provided that the value of the new interests relative to the old interests remains unchanged.

40. The applicant has advised that a key objective of the restructure was to place all optionholders in substantially the same financial position immediately after the restructure as they were immediately prior to the restructure.

41. Having regard to the attributes of the replacement options, as detailed at paragraph 19 of this Ruling, it is considered that the replacement options have maintained the same, or substantially the same, attributes as the Unilife options. The replacement options acquired by a participant as a result of the restructure can reasonably be regarded as matching the Unilife options held immediately before the restructure so the condition in paragraph 83A-130(2)(b) is satisfied.

42. Subsection 83A-130(4) requires that the new ESS interests must be ordinary shares or rights to ordinary shares for the new interests to be treated as continuations of old interests.

43. The replacement option is an option to acquire a share of common stock in Unilife US. The Commissioner accepts that a share of common stock in Unilife US is an ordinary share for the purposes of Division 83A. Accordingly, the condition in subsection 83A-130(4) is satisfied.

44. Having satisfied the requirements in subsection 83A-130(2) and subsection 83A-130(4), the new ESS interests acquired by the participants as a result of the restructure will be treated as continuations of the old ESS interests.

45. Two further conditions under subsection 83A-130(9) must be satisfied before the ESS deferred taxing point in relation to the replacement options can be rolled over. These conditions are:

- (a) at or about the time the participant acquired the new ESS interest, the participant must be employed either by the new company, a subsidiary of the new company; a holding company (within the meaning of the *Corporations Act 2001*) of the new company; or a subsidiary of a holding company of the new company; and
- (b) at the time at the time the new ESS interests are acquired, the participant:
 - (i) did not hold a beneficial interest in more than 5% of the shares in the new company; and
 - (ii) was not in a position to cast, or to control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the new company.

46. The applicant has advised that under the restructure, the employment of employees remained unchanged and a participant would remain an employee of either Unilife, Unilife US or a subsidiary of Unilife US. It is therefore accepted that the continuation of employment condition in paragraph 83A-130(9)(a) is satisfied.

47. The applicant has also advised that at the time the new options were acquired under the restructure, no participant held a legal or beneficial interest in more than 5% of the shares in Unilife US or was in a position to cast, or control, the casting of more than 5% of the casting vote at a general meeting of Unilife US. It is therefore accepted that the conditions in paragraph 83A-130(9)(b) are satisfied.

48. In summary, the options in Unilife US issued to participants in relation to the restructure have satisfied the conditions set out in section 83A-130 and as a consequence these replacement options will be treated as continuations of the Unilife options for the purposes of Division 83A.

Capital gains tax

49. In the circumstances of this Ruling, subsection 130-80(1) applies to disregard any capital gain or capital loss from the CGT event C2 happening on the cancellation of each Unilife option because paragraphs 130-80(1)(a) and 130-80(1)(b), and subparagraph 130-80(1)(d)(ii) are satisfied.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share scheme
- ESS deferred taxing point
- ESS interest
- takeover and restructure

Legislative references:

- ITAA 1936
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B(3)
- ITAA 1936 139CB
- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1997
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 Subdiv 83A-C

- ITAA 1997 83A-110(1)
 - ITAA 1997 83A-120
 - ITAA 1997 83A-120(3)
 - ITAA 1997 83A-130
 - ITAA 1997 83A-130(1)
 - ITAA 1997 83A-130(1)(a)
 - ITAA 1997 83A-130(1)(b)
 - ITAA 1997 83A-130(1)(d)(ii)
 - ITAA 1997 83A-130(2)
 - ITAA 1997 83A-130(2)(a)
 - ITAA 1997 83A-130(2)(b)
 - ITAA 1997 83A-130(4)
 - ITAA 1997 83A-130(9)
 - ITAA 1997 83A-130(9)(a)
 - ITAA 1997 83A-130(9)(b)
 - ITAA 1997 130-80
 - ITAA 1997 130-80(1)
 - IT(TP) Act 1997 Div 83A
 - IT(TP) Act 1997 83A-5(2)
 - IT(TP) Act 1997 83A-5(4)
 - TAA 1953
 - Corporations Act 2001
 - Copyright Act 1968
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ATO references

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